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WONG HUA SEH

v.

DING KUONG HIING

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FEDERAL COURT, KUCHING
ALAUDDIN MOHD SHERIFF PCA
ARIFIN ZAKARIA CJ (MALAYA)
ZULKEFLI MAKINUDIN FCJ
[CIVIL APPEAL NO: 01(F)-10-2008(Q)]

C

23 JANUARY 2009

ELECTION: *Petition - Allegation of corrupt and illegal practices - Bribery or treating - Promise made by respondent during election campaign to build college if elected - Whether promise constituted a form*

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of bribery - Whether promise a corrupt act - Election Offences Act 1954, ss. 8, 10(b), (c), 32(c)

This was an appeal by the appellant/petitioner against the decision of the Election Judge ('EJ') in the High Court dismissing the election petition filed by the appellant. The appellant, who had

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lost by a narrow margin of 51 votes to the respondent in the general election, grounded the petition on the allegation that the respondent, his agents and one Tan Sri Dato' Paduka Ting Pek King ('TPK') had committed corrupt practices of bribery or

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treating under ss. 10(b), (c) and 8 of the Election Offences Act 1954 ('Act'). Evidence was adduced that TPK or the respondent's agents had made promises to the electors of Bintangor that as long as the respondent was elected as a member of the parliamentary constituency of P208 (Sarikei), he would build

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Rahman College in Bintangor. The promise was repeated by the respondent's agents at various places and dates during the election campaign. The EJ found that TPK did make such a promise but that it was not a corrupt act. Hence, the present appeal.

Held (dismissing the appeal)

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Per Arifin Zakaria CJ (Malaya) delivering the judgment of the court:

(1) Section 10(b) of the Act is directed at a promise to procure or to endeavour to procure "any office, place or employment"

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to or for any elector or to any person on his behalf. The promise to construct the college could not by any stretch of the imagination be construed as a promise for an "office",

"place" or "employment" as appearing in s. 10(b) of the Act. It was a legitimate promise in the election and that by itself could not constitute any form of bribery under the Act. Considering the facts in the present case, the conclusion reached by the EJ that at the most the promise could amount to a promise of development in the form of the setting up of Rahman College at Bintangor, which was a legitimate form of campaigning, was correct. In the result, the appellant failed to establish the offence under s. 10(c) of the Act as alleged in the petition. There was also no evidence in this instance to establish the offence of treating under s. 8 of the Act. Furthermore, since the promise was not a corrupt act, the alleged distribution of Chinese pamphlets promising the construction of Rahman College in Bintangor was a legitimate form of campaigning. There was, therefore, no corrupt or illegal practice under s. 32(c) of the Act committed by the respondent or his agents. (paras 9, 16, 18, 21 & 22)

Bahasa Malaysia *Translation Of Headnotes*

Ini ialah rayuan oleh perayu/pempetisyen terhadap keputusan Hakim Pilihanraya ('HP') dalam Mahkamah Tinggi menolak petisyen pilihanraya yang difail oleh perayu. Perayu, yang telah kalah kepada responden dalam pilihanraya umum dengan kekurangan undi sebanyak 51 undi, berasaskan petisyen itu atas pengataan bahawa responden, agen-agennya dan seorang yang bernama Tan Sri Dato' Paduka Ting Pek King ('TPK') telah melakukan perbuatan rasuah menyogok dan membelanjai di bawah ss. 10(b), (c) dan 8 Akta Kesalahan Pilihanraya 1954 ('Akta'). Keterangan dikemukakan bahawa TPK atau agen-agen responden telah berjanji kepada pemilih-pemilih di Bintangor bahawa jikalau responden dipilih sebagai ahli bahagian pilihanraya parlimen P.208 (Sarikei), beliau akan membina Kolej Rahman di Bintangor. Janji itu diulangi oleh agen-agen responden di pelbagai tempat dan masa ketika kempen pilihanraya berjalan. HP memutuskan bahawa TPK telah membuat janji sebegitu tetapi bahawa ia bukan suatu perbuatan rasuah. Oleh itu, rayuan ini dibuat.

Diputuskan (menolak rayuan)
Oleh Arifin Zakaria KH (Malaya) menyampaikan penghakiman mahkamah:

(1) Seksyen 10(b) Akta ditujukan kepada suatu janji untuk mendapat atau untuk cuba mendapat "apa-apa jawatan, tempat atau pekerjaan" kepada atau untuk seseorang pemilih

A atau kepada seseorang atas pihaknya. Janji untuk membina kolej itu tidak boleh dalam apa-apa keadaan ditafsir sebagai suatu janji untuk "jawatan", "tempat" atau "pekerjaan" seperti yang ada dalam s. 10(b) Akta. Ia merupakan sesuatu janji yang sah dalam pilihanraya itu dan ia secara berasingan tidak dapat
B membentuk apa-apa penyogokan di bawah Akta. Mempertimbangkan fakta-fakta dalam kes ini, keputusan yang dicapai oleh HP bahawa janji itu paling pun boleh menjadi suatu janji bagi pembangunan dalam bentuk menubuhkan Kolej Rahman di Bintangor, yang mana merupakan sesuatu cara
C berkempen yang sah, adalah betul. Akibatnya, perayu gagal membuktikan kesalahan di bawah s. 10(c) Akta seperti yang dikatakan dalam petisyen itu. Tidak terdapat juga apa-apa keterangan dalam kes ini untuk membuktikan kesalahan membelanjai di bawah s. 8 Akta. Tambahan lagi, oleh kerana
D janji itu bukan satu perbuatan rasuah, pengataan mengenai pengedaran risalah Cina yang menjanjikan pembinaan Kolej Rahman di Bintangor merupakan cara berkempen yang sah. Oleh itu, tidak ada apa perbuatan rasuah atau melanggari undang-undang di bawah s. 32(c) Akta yang dilakukan oleh
E responden atau agen-agennya.

Case(s) referred to:

Dhartipakar Madan Lal Agarwal v. Shri Rajiv Gandhi [1987] AIR 1577 ***(refd)***

F *Ghasi Ram v. Dal Singh AIR [1968] Supreme Court 1191* ***(refd)***
Harjit Singh Mann v. S Umrao Singh & Ors [1980] AIR SC 701 ***(refd)***
Maganlai Bagdi v. Hari Vishnu Kamath [1958]15 ELR 205 ***(refd)***
S Mahar Singh v. Umrao Singh [1961] AIR Punj 244 ***(foll)***

Legislation referred to:

G Election Offences Act 1954, ss. 8, 10(b), (c), 32(a), (c)

Other source(s) referred to:

Shaw & Sons, 2nd edn (1996)
Tewkesberry Law (1857), 20 Dig 88, 677

H *For the appellant - Chong Siew Chiang (Alvin Yong Sze Lung with him); M/s Chong Brothers Advocates*
For the respondent - Henry Ling Kuong Meng; M/s Ling & Wong

[Appeal from High Court, Sibu; Election Petition No: 26-01-2008]

I *[Editor's note: For the High Court judgment, please see Wong Hua Seh v. Ding Kuong Hiing [2009] 1 CLJ 578.]*

Reported by Suresh Nathan

JUDGMENT

Arifin Zakaria CJ (Malaya):

Background

[1] This is an appeal against the decision of the learned election judge sitting at the High Court in Sibu, Sarawak dismissing the election petition filed by the appellant (the petitioner in the High Court).

The Facts

[2] In the recent general election held on 8 March 2008 the appellant contested the election on the Democratic Action Party (DAP) ticket and polled 10,537 votes. The respondent who contested on the Barisan Nasional (BN) ticket won the election by a narrow margin of 51 votes. The election petition was filed by the appellant on the following grounds:

(a) the respondent or with his knowledge or consent, his agent and Tan Sri Dato' Paduka Ting Pek King (TPK) had committed six instances of corrupt practice of bribery or of treating as understood under ss. 10(b), 10(c) and 8 of the Election Offences Act 1954 (the Act) and therefore the election of the respondent should be declared void under s. 32(c); and

(b) relying on the six instances, even if those acts were not committed by the respondent or by other persons with the knowledge of the respondent but because the general treating had so extensively prevailed in the election and so extensively committed by the respondent for the purpose of procuring or promoting the election of the respondent, the election of the respondent should be declared void under s. 32(a).

[3] Evidence was adduced in the court that at the various places and on different dates, TPK, person or agent of the respondent or with his knowledge or consent, made promises to the electors of Bintangor that as long as "Ding" be elected as a member of the parliamentary constituency of P208 (Sarikei), he would build Rahman College in Bintangor. The promise was repeated by the respondent's agents at various places and dates during the election campaign.

[4] There are two issues before the learned election judge namely:

(a) whether TPK promised that if the respondent was elected TPK would build the college; and

(b) whether such a promise was an offence under the Act.

[5] For the 1st issue, the learned election judge held that:

(a) Going by the report, it meant that TPK had promised to build the college if the respondent wins the election. The petitioner had also relied on a photograph of the respondent taken by a reporter under which ran the words "Vote Ding Kuong Hiing in exchange for Rahman College" but it was not stated by anyone as to whether those words were meant to convey that they were spoken by anyone or by TPK; and

(b) Based on the evidence before the court he was satisfied beyond any reasonable doubt that TPK did promise that if the respondent is elected TPK would build the college and the promise was made in 25 February, 29 February and 2 March gatherings.

[6] As for the 2nd issue, the learned election judge held that:

(a) To succeed under s. 10(b), the petitioner must establish that the promise to build the college comes within the meaning of the term "promises to procure or to endeavour to procure, any office, place or employment". This in turn depends on the meaning of the terms "office", "place" or "employment". All those terms presuppose that the person offered such "office", "place" and "employment" would benefit financially from occupying such positions. That being the case, the offer to build a college which brings no financial gain to a voter cannot amount to a promise to the voters or any of them an "office" or "place" or "employment". The petitioner's counsel did not argue or demonstrate to the court how the promise to build a college can amount to a promise to procure such an "office" or "place" or "employment". Therefore, the petitioner fails to establish a case under s. 10(b);

(b) The voters must have been engaged in the negotiation regarding the building of the college and it must be shown that the voters have demanded for such a college resulting in TPK giving that promise to build the college in return for their votes. All that petitioner produced was evidence of the repeated promise and of what certain witnesses felt regarding the promise but what was needed was evidence of the bargaining which was lacking as there is absolutely no evidence that any voter was involved in such bargaining. The most the promise can amount to was a promise of development in the form of setting up the college in Bintangor which is a legitimate form of campaigning;

(c) The allegation of treating was confined to 25 February luncheon gathering where evidence was led that TPK or his friends had paid for food for 500 people. Under s. 8, it must be established that the food was given in order to influence the voters to vote for whom or whom not to vote. The learned counsel for the petitioner did not elaborate how the luncheon had reaped votes for the respondent which must be established. Therefore, the petitioner had also failed to establish the offence of treating under s. 8; and

(d) Since what was promised by TPK is only a legitimate promise of a form of development for Bintangor, there is nothing corrupt about it and also there was no element of bargaining.

The Contentions Before This Court

[7] In the memorandum of appeal filed before this court the appellant raised eight grounds of appeal. However at the hearing of the appeal, the learned counsel for both parties agreed that this appeal is focused principally on the following two questions:

(1) (a) Is "bargaining" an essential element in the offence of bribery;

(b) Has the learned election judge rightly in fact and in law dealt with the issue of "bargaining";

(c) Irrespective of whether or not there is a bargain, does the promise to build Rahman College on the condition that the respondent was elected fall within the mischief of s. 10(c) of the Act;

A (d) Whether a corrupt practice was committed in connection with the election by the candidate (respondent) or his agent (TPK) or with the consent of the respondent under s. 32(c) and/or whether general bribery and/or general treating have so extensively prevailed that they may be
B reasonably supposed to have affected the result of the election under s. 32(a) of the Act; and

(2) Whether the learned election judge erred in law and in fact in coming to his conclusion that the petitioner has failed to make
C out a case under s. 32(c) and/or a case under s. 32(a) of the Election Offences Act 1954 against the respondent.

[8] It is a firm finding by the learned election judge that TPK did promise that, if the respondent is elected TPK would build the college and the promise was made on 25 February and 2 March
D gatherings. The issue is whether the promise constitutes a corrupt practice of bribery under s. 10(b) and (c) of the Act. Section 10(b) of the Act is directed at a promise to procure or to endeavour to procure "any office, place or employment" to or for any elector or voter or to any person on his behalf.
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[9] The issue is whether the promise by TPK could come within the ambit of the words "office", "place" or "employment". Taking the plain dictionary meaning of these words we agree with the learned election judge that the answer to this question would be
F in the negative. This is simply because the promise to construct the college could not by any stretch of imagination be construed as a promise for an "office", "place" or "employment" as appearing in s. 10(b).

G **[10]** The next question is whether the said promise would be caught by s. 10(c) of the Act which reads:

> (c) every person who, before, during or after an election, directly or indirectly, by himself or by any other person on his behalf, makes any such gift, loan, offer, promise, procurement, or
H agreement as aforesaid to or for any person in order to induce such person to procure or endeavour to procure the election of any person, or the vote of any elector or voter at any election.

[11] The appellant contended that the promise by TPK to build
I the college in Bintangor should the respondent win the election together with the other acts of the respondent and TPK such as, inspection of site and the temporary classrooms, attending the

ground-breaking ceremony and promising that classes will start within the year, all point to the corrupt practice of TPK which was to induce the voters to vote for the respondent. The learned election judge dismissed the appellant's contention on the ground that for a promise to be regarded as corrupt practice of bribery within s. 10(c) there must be present an element of "bargaining". He drew support for his view from the case of *Harjit Singh Mann v. S. Umrao Singh & Ors* [1980] AIR SC 701 where at p. 706 Shinghal J stated:

> It may be mentioned that the trial court rightly took the view that it was necessary for the purpose of proving the corrupt practice of bribery to establish that there was an element of "bargaining" in what the respondent was alleged to have done for Bara Pind and Littran. Reference in this connection may be made to the decision of this Court in *Ghasi Ram v. Dal Singh* [1968] 3 SCR 102, where it was held with reference to the decision in *Amirchand v. Surendra Lal Jha* [1954-55] 10 Ele LR 57 (Ele. Tri. Nag.) that if a Minister redresses the grievances of a class of the public or people of a locality or renders them any help, on the eve of an election, it is not a corrupt practice unless he obtains promises from the voters in return as a condition for his help. It was also held that the "evidence must show clearly that the promise or gift directly or indirectly was made to an elector to vote or refrain from voting at an election, and that "if there was good evidence that the Minister bargained directly or indirectly for votes, the result might have been different". The decision in *Ghasi Ram*'s case was followed in *Om Prabha Jain v. Abnash Chand* [1968] 3 SCR 111, *Bhanu Kumar Shastri* 522 and *Chaitanya Kumar Adatiya v. Smt. Sushila Dixit* [1976] 3 SCR 97. It was therefore necessary for the appellant to plead, and to prove that there was bargaining between the respondent and the voters and he did what he is alleged to have done in Bara Pind and Littran for that reason but, as the trial court has pointed out, there was no such allegation in the election petition. So when the element of bargain was completely absent from the allegation against the respondent, the trial court was justified in holding that the alleged corrupt practice had not been established.

[12] We agree with the learned election judge in this regard and would say that even the facts in *Maganlai Bagdi v. Hari Vishnu Kamath* [1958]15 ELR 205, which was relied upon by the appellant clearly shows that there was an element of bargaining. The facts in that case disclosed that the villagers had asked the appellant to construct a well and said they would vote for the

A Congress candidates if the well was constructed. The appellant then asked the villagers to show him a suitable site. A deposit was paid towards the construction of the well.

[13] It is clear in that case that there was a bargain struck B between the villagers and the appellant in that the villagers agreed to vote for the Congress on condition that the appellant constructed a well for them. The outcome of the bargain was that the villagers would get a well and in return the appellant was promised their votes.

C **[14]** In the alternative, learned counsel for the appellant submitted that in the present case there was in fact a "bargain" as the promise to build Rahman College was not denied by the respondent and that had caused some voters to vote for the D respondent. On this we agree with the learned election judge that, those facts alone was not sufficient to constitute a "bargain". In order to constitute such a bargain there must be present a promise from the appellant to build Rahman College and a counter promise by the voters to vote for the appellant. Here, there was E no evidence of a counter promise by the voters.

[15] In any election the candidate is bound to make promises to bring development to the constituency in which he is standing, this alone in our respectful view could not constitute "bribery" as used in the Act otherwise the whole process of election will be F meaningless. For how else could a candidate appeal to the electors to vote for him. In *Dhartipakar Madan Lal Agarwal v Shri Rajiv Gandhi* [1987] AIR 1577 the Indian Supreme Court stated the position in the following words:

G > A candidate, his workers and supporters have every right under the law to canvass for the success of a particular candidate saying that if elected he could work for the development of the constituency. Such a promise does not in any way interfere with the free exercise of electoral right of the electors.

H **[16]** Similarly here, the promise to build the Rahman College is in our view a legitimate promise in the election and that by itself could not constitute any form of bribery under the Act. The promise to bring Rahman College to the constituency made by the respondent together with TPK can be construed as a promise to I bring development to the constituency. This will benefit every one in the constituency seeking higher education irrespective of which

ever way he or she may have voted in the election. In *Ghasi Ram v. Dal Singh* AIR [1968] Supreme Court 1191 Hidayatullah J, following *S. Mahar Singh v. Umrao Singh* [1961] AIR Punj 244, stated that the evidence required to establish corrupt practice under the Representation of the People Act (1951) in the following words, which we think are equally applicable to us:

> In our opinion the law requires that a corrupt practice involving bribery must show clearly that the promise or gift directly or indirectly was made to an elector to vote or refrain from voting at an election.

[17] In that case the money was not distributed to the voters directly but to the Panchayats and the public at large. It was to be used for the good of those for and those against the candidate. There the Supreme Court held that they had the effect of pushing forward the claims of the respondent but that was inevitable even if no money was spent but good administration changed the people's condition. Therefore the Court held that there was no corrupt practice. But it said the result would have been different had there been any evidence that the Minister had bargained directly or indirectly for votes.

[18] Having considered the facts in the present case we agree with the conclusion reached by the learned election judge that at the most the promise in this case can amount to a promise of development in the form of setting up of the Rahman College at Bintangor which is a legitimate form of campaigning. In the result we hold that the appellant failed to establish the offence under s. 10(c) of the Act as alleged in the petition.

[19] The second ground in support of the appellant's petition is founded on s. 32(a) and (c) of the Act. It was alleged that the offence of treating was committed by TPK by holding the luncheon gathering on 25 February. It was not disputed that the luncheon was sponsored by TPK for some 500 people. We agree with the learned election judge that to prove treating under s. 8 the appellant need to establish beyond reasonable doubt that food was provided with the intention of influencing the voters to vote for a candidate or not to vote a candidate at an election.

[20] The learned election judge found as a fact that there was no such evidence before the court. Quoting from *Schofield's Election Law*, vol. 1, *Shaw & Sons*, 2nd edn (1996), which referred to *Tewkesberry Law* (1857) 20 Dig 88, 677 it is stated that:

A For to prove treating to be corrupt it is necessary to prove that some person has been thereby corrupted and induced by such treating to vote for the sitting member.

[21] This statement of the law we think is equally applicable to us having regard to the provision of our s. 8 of the Act, since there is no such evidence before the court. Therefore, the learned election judge had rightly ruled that the appellant failed to establish the offence of treating under s. 8.

[22] As regards the complaint by the appellant on the distribution of Chinese pamphlets promising the construction of Rahman College in Bintangor by certain individual wearing BN badges, this issue depends essentially on how the court perceive the promise by TPK to construct Rahman College. As the learned Election Judge has ruled and we agree with him that such a promise is not a corrupt act in the circumstances of this case, therefore, it follows that the distribution of the pamphlets is a legitimate form of campaigning and hence no corrupt or illegal practice under s. 32(c) was committed by the respondent or his agent.

Conclusion

[23] In the result we hold that the appeal is without merit and it is hereby dismissed with costs. Deposit to account of taxed costs.